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Is Interpretation in International Law a Game?

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Abstract:

The present chapter combines the ubiquitous metaphor of the language of international law with the analogy between interpretation and the playing of games. It asks how to possibly make sense of international law as a language and of interpretation as a game. Above all, it elucidates the linguistic assumptions embedded in established uses of the metaphor and the analogy. It ultimately argues that interpretation might not be well understood in analogy to games, not if the game is anything like the typical example of chess. Established approaches picture interpretation as a rule-governed activity. In turn, they see it as instructed by a given language, as ordered by a pervasive grammar, or as based on a set of constitutive background rules. But in law, as in language, we make the rules as we go along. There are a variety of good methodological, political, and strategic reasons for rejecting the dualism between a background scheme—be it a language, a grammar or a set of constitutive rules—and its execution. If that is so, how then can we still see interpretation as an ordered activity? A first answer fleshes out a view of interpretation as a creative practice in which actors struggle for the law. The practice is constrained and stabilized by tradition. A second, more radical, alternative demonstrates how and why it might make sense to argue that there is no language to play with. Interpretation then aims at a better understanding of the speaker, not of any language of international law.

Keywords: interpretation; language of international law; linguistics; sociolinguistics; semantic pragmatism; Donald Davidson.

I. Introduction

International lawyers of contrasting colours converge in thinking of international law as a language. The United Nations, in its 1995 Congress on Public International Law, chose
Depending on their specific outlook, international lawyers perceive the language of international law as doing a whole range of things. It offers a steadfast vocabulary of progress and resistance, it brings opponents together through a pacifying grammar, or it provides a battleground on which to carry out conflicts. Some note with a sense of sober nonchalance that international law is nothing more than rhetoric. Others show an upbeat attitude against ages of realist critique, arguing that international law is a pervasive language after all.

The present chapter explores what it means to play with that language of international law. It takes the metaphor of the language of international law seriously and combines it with the analogy between interpretation and the playing of games. This overall outlook resonates with images such as that drawn by Marc Weller, who notes that ‘to some, the practice of international law is akin to an exciting game of chess. Expert players, or litigators move the pieces on the board, seeking to convert tactical dominance into strategic victory in the case they argue.’ The chapter will discuss three common ways of using the metaphor of the language of international law. It highlights the linguistic assumptions nested in each usage, thereby elucidating precisely what it means to play the game of interpretation from each perspective. It then draws attention to the limits connected to this analogy and points out ways to overcome them.

First, the metaphor of the language of international law is used in the sense that it functions as a defence against the powerful for the benefit of the right and virtuous. It stands firm and unyielding against forces that corrupt. In just one instance of such a view, Dino Kritsiotis argues that ‘[t]he rhetoric and reality of might, power, force, and war are thus gradually being displaced by a new rhetoric—or, more accurately—a new language of law, principle, precedent, and procedure.’ The language of the law is at least sufficiently stable so as not to be easily corrupted. From a linguistic perspective, language relates to speaking like a background scheme relates to its execution (Section II).

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2 It thus picks up the thrust and gist of the present volume: see D Peat and M Windsor, [].


A similar view is nested in a second approach, according to which the language of international law bridges troubled waters and allows conflicting sides to converse in a common idiom. Especially where issues are sensitive and divisive, international law offers, as Georg Nolte put it, ‘a language in which states and other relevant actors exchange views on the specific problems of difficult cases.’\(^5\) The idiom of international law brings opponents together in a pacifying grammar. To play the game of interpretation requires a competence or technique shared by other professionals that allows them to speak to one another when others have stopped speaking. On this account, professional competence decides what counts as a good performance in the game (Section III).

A third variation breaks with the first two approaches by rejecting a dualism between a background scheme, or grammar, and its execution. Instead, it emphasises how participants in international legal discourse try to use and bend the rules of the game in a struggle for the law.\(^6\) As Martti Koskenniemi observes, ‘international actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents.’\(^7\) Here, the language of international law provides a battleground to carry out conflicts and interpretation involves a potential exercise of power (Section IV(A)).

While the first two understandings portray language as providing the rules of the game and as clarifying which moves are possible and correct, the third opens up towards a view in which success in the interpretative game decides what the law is and how the game should be played. The nature of the game accordingly changes. The dualism between rules of the game and their performance, I will argue, should indeed be rejected. The focus should instead fall on the side of concrete performances and the forces that shape them (Section IV(B)). The continuing challenge is to make sense of interpretation in international law without (re-)introducing such a dualism (Section IV(C)). It ultimately transpires that interpretation may in fact not be well understood by analogy to a game,


not if that game is anything like chess. In law, as in language, we make up the rules ‘as we go along’.8

I argue that the continuing challenge may be met by understanding interpretation as a practice that is stabilised by tradition (Section V). A powerful and radical alternative, finally, is to suggest that there is no language to play with. Interpretation, on this account, is not viewed as participating in the linguistic practice of international law at all. Such a view instead allows for a better appreciation of the interpreter and draws out what she takes to be true in international law (Section VI).

By investigating these ways of understanding interpretation in international law as a game, I pursue three aims. First and foremost, my inquiry aspires to contribute to a better view of the practice of interpretation. Second, I will critically discuss the different ideas about the relationship between language and interpretation. How much water do they hold? This comes, finally, with programmatic ambitions of informing views of interpretation in international law more thoroughly with theories of language. The aim is to irritate and to possibly provoke adjustments in our conceptions of interpretation. Put simply, I want to see what traction the analogy between interpretation and playing games has and to thereby contribute to mapping the game of game-playing.9 I will place my bets on the third approach, which presents the language of international law as a battleground and interpretation as a struggle for the law. To make good sense of that approach, interpretation should either be seen as a practice that shapes the rules of the game or, alternatively, it should be seen as an attempt at better understanding what the interpreter takes to be true in international law. The choice between the latter two views depends on strategy and the specific interests of inquiry.

II. Like a game of chess

In the words of former UN Secretary-General Boutros Boutros-Ghali, ‘next to the society of states, there is an international scientific community that desires to establish

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9 See A. Bianchi, in this volume, (p27) (‘little interest in metadiscourse’).
law as a language of international relations.' The UN supports such desires, as Rosalyn Higgins explained, in order ‘to promote a common language of international law among the peoples of the United Nations and a universal culture shared by all nations that is conducive to peace, justice, and the rule of law.’ The language of international law offers a stable vocabulary of virtue. Playing the game of interpretation puts it to use.

Further examples in this vein abound. For Dino Kritsiotis, international law provides ‘a new communicative medium which professes to be: more peaceful in its outlook … [and] more secure in terms of the answers and solutions it provides’. It would be easy to belittle this view as rosy naivety; it would be unfair as well. Arguments that law is as much an expression of power as its antidote prompt Kritsiotis to ask: ‘Is international law a meaningful and real counter-language to power, or are its credentials skin-deep and ephemeral?’ His answer first reverts to well-known accounts of power politics in which the language of the law prevailed. But whatever the critique, the language of international law is pervasive and that bodes well. According to Kritsiotis, we should not be ‘distract[ed] from the increasing influence that international law has as a language for inter-state and even intra-state intercourse.’ On balance, that language functions as a bulwark against power.

This view of the language of international law boils down to the postulation of a stable language that instructs and supports its speakers. Interpretations tap into the resources that the language of international law provides its speakers with in order to fight the rival language of power and to aim at peace, justice and the rule of law. Interpretations are structured and supported by the relatively stable language they use.

This view of the practice of legal interpretation finds support in the classic work of Ferdinand de Saussure, who famously distinguished between a language (langue) and

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13 Ibid, 400.
15 Ibid, 401.
speaking (parole). The former orders the latter. Saussure influentially paved the way for modern linguistics by developing a theory of language that overcame modes of thinking which tied language all too closely to the world. Previously, the meaning of words in one way or another was linked to what they represented in reality. Through its representation of reality, language was thought to gain stability. Saussure freed himself from this spell. On his approach, the meaning of ‘combatant’, for instance, is not stable because it represents a combatant. Instead it gains its meaning through its distinction from other expressions such as ‘civilian’. Saussure’s core proposition was that ‘[l]anguage is a system of signs’. Such a system is markedly different from any act of speaking. The two are related, but ‘their interdependence does not prevent their being two absolutely distinct things’. On this account, language orders the facts of speech and constitutes ‘the norm of all other manifestations of speech’.

Saussure offers an illustrative and evocative comparison in this regard. ‘[O]f all comparisons that might be imagined’, he writes, ‘the most fruitful is the one that might be drawn between the functioning of language and a game of chess. … A game of chess is like an artificial form of what language presents in a natural form’. Certainly each move on the chessboard changes the state of the game and it affects later moves. But it does not affect the rules of the game. For present purposes, this would mean that speaking the language of international law does not change the law. Language not only exists independently of its operation, but it also forms the basis for deciding which operations are correct, and which are mistakes. Accordingly, the language of international law is something like a sweet symphony in which interpreters play by the score and the score ensures that every individual interpretation contributes to something

18 F Saussure, Course in General Linguistics, above n 16, 16. I am leaving aside the strand of critique that focuses on the relationship between signs and sounds in Saussure’s work: see J Derrida, Of Grammatology (Johns Hopkins University Press, Baltimore, 1997) 30–44.
19 Ibid, 19. For a discussion of the reasons that might have driven Saussure to such a view, see S Krämer, Sprache, Sprechakt, Kommunikation (Suhrkamp, Berlin, 2001) 22.
20 F Saussure, Course in General Linguistics, above n 16, 9.
21 Ibid, 88.
beautiful in the broader scheme of things. Mistakes are not only easy to hear, at least to the trained ear. They also leave the score unblemished.

III. The grammar of the game

A second and related way of thinking about the language of international law does not imply a similar degree of faith in the virtues of a given vocabulary. Yet it sees certain benefits in using its grammar. If not a bulwark against power, the language of international law nonetheless builds bridges. Participants in contentious political disputes speak the language of law if, or especially when, waters are rough. One commentator argues that:

> [t]he desire to test the objectivity of international law vis-à-vis the alleged subjectivity of politics obscures the most universal claim that international law makes — that of a constructive, problem-solving communicative device for the speech community of diplomats.

For example, James Crawford notes that the discourse on the divisive issue of Palestinian statehood does not give up the pretence of the legal game itself. Instead, ‘the obstinate fact remains that the actors, most of the time, continue to use the language of law in making and assessing claims.’ This game is meaningful because it provides the participants with yardsticks for critique. For Crawford:

> International law scholars are not like critics in an empty theatre … [the fact that] the language of law is used implies that these claims can be assessed, on the basis of values which extend beyond allegiance to a particular party, country, bloc or religion.

In this vein, Ian Johnstone has traced the prevailing legal discourse in Security Council deliberations, concluding that ‘international law is at once the language of international society and an important determinant of who has a voice’. While it

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22 The comparison with a symphony, too, stems from Saussure’s treatise. He asserts that ‘what the symphony actually is stands completely apart from how it is performed; the mistakes that musicians make in playing the symphony do not compromise this fact’: ibid, 18.
excludes those who do not know its technique or lack access to venues of authoritative discourse, it also brings actors together. Johnstone notes that ‘the specialized discourse of international law provides an additional layer of cohesiveness’, and that ‘governmental, inter-governmental, and nongovernmental actors … speak the language of law’. 27 The game is characterised by a distinct grammar. It isolates the speaker from other contexts and reconstitutes her as a player in a different game. Oscar Schachter embraced this idea when he pointed to lawyers’ capacity to speak to one another while other disciplines are divided through specialisations.28

Much international legal scholarship has converged on the view that international law is, above all, a technique — a technique that allows for meaningful engagement with one another as lawyers and a technique that constitutes law as a distinct discipline. It is this idea of a potentially unifying rules of the game that partly underpins the recent calls to defend a ‘culture of formalism’ and to safeguard international law’s autonomy against the intrusion of other language games of morality and politics.29 The common grammar can unite a variety of actors with different roles and different worldviews.30 What interpreters do as they speak the language of international law is to employ their technical competence and demonstrate their craft as legal professionals. What accounts for their competence?

Noam Chomsky might have an answer when he suggests that language is indeed best studied as a competence. It is easiest to unfold his argument against the backdrop of an apparent puzzle: children learn the correct use of a language in spite of the fact that the input to which they are exposed mostly consists of grammatically truncated sentences

Moreover, the input certainly falls short of the unlimited possibilities for using any language.\(^{32}\)

A record of natural speech will show numerous false starts, deviations from rules, changes of plan in mid-course, and so on. The problem for the linguist, as well as for the child learning the language, is to determine from the data of performance the underlying system of rules that has been mastered by the speaker-hearer and that he puts to use in actual performance.

The poverty of stimulus prompts Chomsky and others to argue that language is really best explained in terms of the innate competence of every speaker. This innate competence enables speakers who are faced with the mixed record of actual performance to identify grammatically correct uses of language. Martti Koskenniemi likewise noted that ‘[a] grammar is not a description of what native language-speakers say in fact — it is an account of what it is possible to say in that language.’\(^{33}\)

Chomsky argues that it is not feasible to approach language through observation of what speakers actually say or through studying language as a system of signs, as Saussure would have it.\(^{34}\) Deep structures (language/competence) cannot be identified by looking at surface structures (speaking/performance), he notes, simply because there are an infinite set of potential deep structures that could explain any act of speaking.\(^{35}\) The choice between different possible deep structures thus requires intuition. Speakers of native language(s) have a feeling for what is right even when they cannot articulate the grammatical rule.\(^{36}\)

While Chomsky rejects Saussure’s juxtaposition of language and speech, he introduces a new dichotomy between linguistic competence and actual performance. Echoing Saussure’s comparison of speaking a language and playing a game of chess, Chomsky makes ‘a fundamental distinction between competence (the speaker-hearer’s knowledge of his language) and performance (the actual use of language in concrete


\(^{36}\) Over time, Chomsky switched from speaking about *rules* that are followed to *parameters* and *principles*: see N Chomsky, *Language and Mind*, above n 31, 23 – 24.
situations).37 Innate linguistic competence enables every speaker to separate the correct uses of a language from its deformations.38 This theoretical distinction reminds us that performance does not feed back into what it means to speak a language correctly. It does not affect the rules of the game. In other words, the symphony’s score remains unblemished by mistakes in its performance.

On this account, interpreters in the game of international law are tied together by a deep structure of syntactic rules and principles. This grammar draws the contours of what it means to speak the language of international law and what it means to speak it correctly. The language of international law is less a model against which specific interpretations could be termed right and wrong. Instead, knowing the grammar of the language allows an infinite variety of things to be said and done with that language. In this way, Chomsky differs from Saussure. The role of international law changes from constituting a bulwark against power to a shared competence that brings opponents together. But like Saussure, who privileged language over speaking, Chomsky regards linguistic competence as ordering actual performance. Transposed to the language of international law, it is this language that stabilities interpretation.

IV. The nature of the game reconsidered

A. The game as a struggle for the law

In a third approach the stabilising ground of a given language is lost.39 Instead, that language is shaped in the process of playing the game. With their interpretations, actors struggle for the law and thereby make the law. They try every trick in the book in order to pull the law onto their side. The emphasis here does not fall on a background language but on the act of speaking, less on competence and more on performance. This third approach to interpretation may be captured as a semantic struggle in which actors try to find acceptance for the claims they make about the law as they try to influence

38 One may even follow Chomsky and distinguish between internal and external languages, where the former offers the scheme against which to judge the latter: see N Chomsky, Language and Mind, above n 31, 175; N Smith, ‘Chomsky’s science of language’ in J McGilvray (ed), The Cambridge Companion to Chomsky (Cambridge University Press, Cambridge, 2005) 21, 35 – 36.
39 A helpful early overview is offered by DZ Cass, ‘Navigating the newstream: Recent critical scholarship in international law’ (1996) 65 Nordic Journal of International Law 341
what is considered (il)legal. The language of international law above all provides a battleground to carry out conflicts.

This understanding is well reflected in Jean Combacau’s and Serge Sur’s general treatise on international law, where they write lucidly that “[t]he controversies pertaining to interpretation would not be so animated were they not a translation of a struggle for the mastery of the legal system.” The understanding is also reflected in Koskenniemi’s aphorism that ‘international law is what lawyers do and how they think’. If actors want to play the game of international law, then they need to compete on its terms. But these terms are incapable of telling us who is right and who is wrong. Such an essence remains elusive. Each interpretative claim remains particular and its aspiration to universality doomed to fall flat. According to Koskenniemi, if an interpretation of international law succeeds, it is hegemonic in the sense that it portrays as universal what is really particular. In his view, ‘[t]he task for international lawyers is not to learn new managerial vocabularies but to use the language of international law to articulate the politics of critical universalism.” International lawyers emulate Sisyphus in their quest for objectivity only to realise that it escapes them every time they think they have captured it. Interpretation is a game without end.

A number of studies have embraced a similar understanding of the language of international law to show its emancipatory potential as well as the factors that hold it back. Others, with a bleaker outlook, have suggested that the language of international

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40 I have sketched such a perspective of semantic struggles in the practice of legal interpretation in detail in I Venzke, above n 6, 37–64.
45 J von Bernstorff, ‘Sisyphus was an international lawyer: On Martti Koskenniemi’s “From Apology to Utopia” and the place of law in international politics’ (2006) 7 German Law Journal 1015.
law offers little more than a lullaby that lures its speakers into mantras of objectivity and progress while catastrophes pile up.\textsuperscript{48} Even worse, it could lift burdens of responsibility from the shoulders of those who should feel them heavily. David Kennedy notably argues that in war, the language of international law ultimately camouflages political decisions and stifles second thoughts.\textsuperscript{49} In international criminal law, it has been argued that legal language might, above all, offer comfort for practitioners, academics and politicians alike.\textsuperscript{50}

Several things have happened to the game of interpretation in this variation of the theme when compared to the first two approaches. It seems that there is no longer a model that could offer guidance. With a shift in focus from competence to performance, the distinction between the law and its interpretation is questioned. The dualism between a linguistic model and its execution collapses.

\textbf{B. Why reject the dualism?}

The linguistic assumptions nested in attempts at making sense of the language of international law by analogy to a game of chess, where a move in the game leaves the rules unaffected (speech ordered by language), or where its stable grammar transcends geographical and professional boundaries (performance ordered by competence), have come under criticism from a variety of angles. Critics question the decision to privilege the model over its application, the abstract and idealised over the concrete and perceptible. For them, speech and performance should be the primary object of study. In other words, interpretation in international law should be the object of study in its

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own right, rather than the proxy of an underlying scheme of rules. Wittgenstein already suggested as much when he pushed the notion of language games into the limelight:

[1]In philosophy we often compare the use of words with games and calculi which have fixed rules … But if you say that our languages only approximate to such calculi you are standing on the very brink of a misunderstanding. For then it may look as if what we were talking about were an ideal language. As if our logic were, so to speak, a logic for a vacuum.

Dell Hymes, in his contribution to the counter-current of sociolinguistics, thus described Chomsky’s work as offering a ‘garden of Eden view’. For Hymes, the focus of study should really fall on the sociocultural features that permeate language acquisition and usage. It is not that the rules of the game remain unmoved by the practice of playing. Rather, they are the product of the game as it is played in specific situations. In order to capture context-specific differences, Hymes presents the notion of a speech community, which he defines as ‘a community sharing rules for the conduct and interpretation of speech, and rules for the interpretation of at least one linguistic variety.’ The concept of communicative rather than linguistic competence reflects the shift from background language to surface communication.

In international legal communication, the spotlight would fall on differences between ways of speaking in human rights and trade law, for instance. They would not

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51 L Wittgenstein, Philosophical Investigations, above n 8, para 81.
be brushed aside as variations of the same language.\textsuperscript{56} From the angle of sociolinguistics, it could be seen how ‘people act out the social structure, affirming their own statuses and roles and establishing and transmitting the shared systems of value and of knowledge.’\textsuperscript{57} This would easily get lost if the analogy between the practice of interpretation and the playing of a game were to suggest a dualism between an ideal set of rules in the background, on the one hand, and acts of interpretation as their manifestation.

In a sweeping blow against idealisations aiming at objectivity, Pierre Bourdieu further adds to the critique of linguistics à la Saussure and Chomsky. His argument first supports the view of international law as a battlefield on which actors struggle for the law when he notes that ‘[t]he practical content of the law … is the product of a symbolic struggle between professionals possessing unequal technical skills and social influence.’\textsuperscript{58} He decidedly rejects forms of objectivism that fall for:\textsuperscript{59}

the illusion of linguistic communism … the illusion that everyone participates in language as they enjoy sun, the air, or water. … [But] access to legitimate language is quite unequal, and the theoretically universal competence liberally granted to all by linguists is in reality monopolised by some.

In a broader methodological critique, Bourdieu argues that there is a profound problem with presenting language ‘as an objective reality that exists independent of the individuals who live and act in that reality’.\textsuperscript{60} It matters what speakers want to do with language, how they act with it, and what they practically can do with it. Bourdieu argues that abstracting from these contexts and constraints is a ‘scholastic fallacy’, with reference to the work of linguist John Austin.\textsuperscript{61}

\textsuperscript{56} For an account of how that can be done with good reasons in international law, see B Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20 European Journal of International Law 265.
\textsuperscript{59} P Bourdieu and L Wacquant, \textit{An Invitation to Reflexive Sociology} (University of Chicago Press, Chicago, 1992) 146.
\textsuperscript{60} Ibid, 141.
\textsuperscript{61} Ibid, 141. In further detail, see P Bourdieu, ‘The Scholastic Point of View’ (1990) 5 Cultural Anthropology 380.
Austin himself presented two main arguments for rejecting the dualism between language and speech or between competence and performance.\(^{62}\) The first one is crucial and programmatic: speaking is a creative activity. ‘[T]here can hardly be any longer a possibility of not seeing that stating is performing an act’, he writes.\(^{63}\) Austin develops his argument with dramatic tension. At the outset he suggests distinguishing constative from performative speech acts, where the former are of a descriptive nature such as ‘this is a combatant’ in the laws of war, and the latter do things with words, such as baptising a child or christening a ship.\(^{64}\) Then the inexorable conclusion slowly transpires. Any attempt at distinguishing constative and performative speech acts ultimately fails. All speech acts are performative. It is impossible not to interpret and to partake in the creation of the world and of the language in it.\(^{65}\)

The second complementary reason for rejecting the dualism observes that not all speech acts succeed in performing what they want to achieve.\(^{66}\) Clearly, not anybody can christen a ship in passing. Whether speech acts succeed is subject to a series of contextual constraints. The standard against which they need to be assessed, according to Austin, is not any background scheme that could identify them as true or false. They are measured by their success. By way of illustration, a statement such as ‘this is a combatant’ would fail not because there really was a civilian and not a combatant. Saussure already cut those ties between words and what they represent.\(^{67}\) For Austin, social conventions and context are the only standard against which it is possible to say whether a speech act succeeds. Does social convention support that the person with army insignia and a rifle is called a combatant? The standard of success sits nowhere other than in the contextualised practice of speaking.

In sum, Austin argues that any distinction between constative and performative speech acts collapses and that speech acts cannot be assessed on any basis sitting behind or beyond the context of performance. Instead, the context of speaking and the

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\(^{64}\) Ibid, 140–141.

\(^{65}\) Ibid, 141.

\(^{66}\) ‘They can be ‘infelicitous’, as Austin would say. See JL Austin, ‘Performativa Utterances’ in *Philosophical Papers* (Oxford University Press, Oxford, 1961) 220, 235 and 244.

\(^{67}\) See above n 16.
conventions to which it gives rise offer the only test for the success of speech acts. Austin, who was a contemporary of HLA Hart in Oxford, wrote with a side-swipe to lawyers: ‘[o]f all people, jurists should be best aware of the true sense of affairs. … Yet they succumb to their own timorous fiction, that a statement of ‘the law’ is a statement of fact.’ Quite to the contrary, a statement of the law contributes to the making of law. Austin himself concludes:

We have discussed the performative utterance and its infelicities. That equips us, we may suppose, with two shining new tools to crack the crib of reality maybe. It also equips us — it always does — with two shining new skids under our metaphysical feet. The question is how we use them.

C. How interpretation is unlike playing a game

One way of using the ‘shining new skids’ further develops Austin’s inchoate theory concerning the contextual conditions that account for the success of speech acts. When does a claim in the language of international law succeed? John Searle continues in Austin’s steps when he argues that the success of a speech act depends on whether it conforms to background conventions. What Searle purports to add is an exhaustive taxonomy of speech acts which are based on background conventions, ensuring that speakers can do the things with words that they want. Background conventions tie speakers and hearers together and permit others to understand what the speaker means. Accordingly, Searle’s main argument is that ‘[s]peaking a language is engaging in a (highly complex) rule-governed form of behaviour.’ Speaking is constituted by rules and would not be possible otherwise.

Like Saussure, Searle draws an analogy with chess. The rules for both language and chess are constitutive in the sense that they render the activity possible in the first

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68 On these three main conclusions from Austin’s work, see G Deleuze and F Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (University of Minnesota Press, Minnesota, 1987) 78.
69 JL Austin, above n 63, 4.
71 JL Austin, ‘Performative Utterances’, above n 66, 228.
Background conventions are constitutive rules establishing that a sentence \( x \) counts as \( y \) in a given context \( c \). This can be illustrated by a straightforward example from the language of international law. If the UN Security Council decides that a situation amounts to a threat or breach of international peace and security, then this opens up options under Chapter VII of the UN Charter. Searle supports his argument by suggesting that:

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\text{the semantic structure of a language may be regarded as a conventional realisation of a series of sets of underlying constitutive rules, and that speech acts are acts characteristically performed by uttering expressions in accordance with these sets of constitutive rules.}
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In this way, Searle notably re-introduces the dualism of a background scheme and its execution. He turns around midway on the ‘shining new skids’ with which Austin had equipped him.

Searle’s work has inspired a number of international law and international relations scholars, especially in their quest to offer a definition of international law. Nicholas Onuf, for example, framed the international legal order as a set of interconnected speech acts in order to argue that it is the defining feature of legal claims that they are able to achieve what they want without the assent of the hearer. Probing what Onuf and others have to offer for an understanding of interpretation starts to reveal some of the main problems that come with understanding the language of international law in light of speech act theory à la Searle (that is, by analogy to a game of chess).

I see three main problems. First, Searle pursues a strategy of deliberate idealisation when he argues that background conventions provide the conditions for speech acts to be successful. Conventions in fact ensure that speakers’ intentions can be

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74 Ibid, 33–34.
75 Ibid, 37.
revealed. Generally, such a view can be critiqued on methodological grounds. Again there is a stabilising background, structuring performance. The more specific point with regard to the language of international law becomes clearer in light of a related second problem. It was Searle’s aim to provide an account of how understanding is possible. That is typically not the issue in any interpretative dispute in (international) law. It is not that opponents do not understand one another, although that can happen. Usually they do understand and disagree. The third problem is that constitutive rules are troubled by indeterminacy. It is unconvincing to simply take any given context as a given. Speaking is not like playing chess because the world is not chequered in black and white, because speaking typically has an ulterior purpose, and because in speaking we make the rules ‘as we go along’.

There is one way in which the analogy between interpretation and playing a game can be rescued from the pitfalls of an easy dualism between rules and moves. That is to understand speaking the language of international law as a practice (Section V). The more radical alternative would be to suggest that there is no language to play with (Section VI).

V. Interpretation as a practice

How could it be possible to make sense of interpretative games in international law without a background scheme that serves as a standard against which interpretations can be assessed as right or wrong moves? What could stabilise the language of international law if it is not some kind of guiding background structure? Saussure already hinted at an answer when he argued that nothing outside language secures the meaning of words. He argued instead that meaning is only created through arbitrary distinctions, and that the sole thing that can stabilise those distinctions is tradition. ‘Because the sign is arbitrary’, he wrote, ‘it follows no law other than that of tradition, and because it is based on tradition, it is arbitrary.’

This idea has now caught on. A truly ubiquitous way of rearticulating the stabilising role of tradition is to say that meaning is conventional in the way I have just

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78 Following Searle, they even allow thinking of interpretation as an act of cognition: S Krämer, above n 19, 70.
79 See above n 8.
80 F Saussure, Course in General Linguistics, above n 16, 74.
discussed. Indeed, for Wittgenstein, meaning cannot possibly be found anywhere but in the conventions about how words are used.\(^8\) This is precisely how he thought of language games. But the way Searle refined this position re-introduces a dualism not between language and speaking but between conventions and their application. The main problem is that any rule – generally, \(x\) counts as \(y\) in context \(c\) - will be troubled by indeterminacy. What, for instance, counts as context \(c\) ? Following Wittgenstein, the articulation of a rule that explains meaning is subject to the same fate of only gaining meaning through another rule of conventional use. The result is an infinite regress: ‘Any interpretation . . . hangs in the air along with what it interprets, and cannot give it any support.’\(^8\) In a similar vein, HLA Hart observed that:

\[
\text{the canons of interpretation … are themselves general rules for the use of language, and make use of general terms which themselves require interpretation. They cannot, any more than other rules, provide for their own interpretation.}
\]

The way to get out of this conundrum leads via practice, for Wittgenstein as well as for Hart.\(^8\) Wittgenstein’s idea is that actors learn and internalise in a process of socialisation what signposts or the words of treaty norms mean.\(^8\) How then is it at all possible to tell that a rule can be said to be applied (in)correctly? What orders interpretation if it is not that which is being interpreted? The text itself does not give away the answer because it gains its meaning only through the practice of how it is used. Interpretation substitutes one expression of the rule for another.\(^8\) Together with the interpretation, the text hangs in the air and cannot offer support for what are regarded as (in)correct interpretations.

The question of what is a wrong interpretation can only be answered by other participants in an interpretative community. Other participants need to say what an

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interpreter can get away with. There are many factors that influence the likely success of an interpretation. The most important one in the language of (international) law is how any legal claim connects to tradition. Robert Brandom, speaking on strands of semantic pragmatism in the philosophy of language, has expressed this thought with profound insight when he wrote that ‘[t]he current judge is held accountable to the tradition she inherits by the judges yet to come’.  

It is a characteristic feature of the language of (international) law that it compels its speakers to connect to the past, to prior instances of speaking.

Interpretative games in international law, on this account, present themselves as a practice that is both creative and constrained. Actors struggle for the law. Language offers a battleground. It may look like a game but it is not well understood by analogy to something like chess. It is a game like those of children when they make up the rules as they go along. The trick is to see interpretation as a rule-guided activity without stipulating the rules as a background scheme that sit on the outside. Only later interpretations will tell what is right and wrong. Stability in this practice flows from tradition and from historical practices. Wittgenstein sums this up with typical eloquence: ‘Grammar is the account books of language. They must show the actual transactions of language’. David Lewis picked up this idea in his seminal paper ‘Scorekeeping in a Language Game’ and Brandom develops it further, showing how

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90 Wittgenstein in fact uses the concept of ‘game’ to show how the things referred to as game do not share a common core but a family resemblance: L Wittgenstein, Philosophical Investigations, above n 8, paras 67-70.

91 These factors underpin what counts as ‘competent performance’. For the understanding of practice as competent performance, see E Adler and V Pouliot, ‘International Practices’ (2011) 3 International Theory 1, 4-5.

92 L Wittgenstein, Philosophical Grammar, above n 8, para 44.
scorekeeping tracks the correct use of words.\textsuperscript{93} The imagery of playing games sneaks back in, but Brandom is quick to note how it misleads and should thus be treated with caution.\textsuperscript{94}

VI. And If There Was No Language to Play with?

Lewis not only developed the idea of scorekeeping in language games. He also opined that ‘[i]t is a platitude that language is ruled by convention’.\textsuperscript{95} In addition, he notes that it is the profession of philosophers to question platitudes.\textsuperscript{96} Sure enough, the platitude that language is ruled by convention has also been questioned. Donald Davidson has probably set out the most refined argument in this regard, causing a stir when he concluded that ‘there is no such thing as a language, not if a language is anything like what many philosophers and linguists have supposed.’\textsuperscript{97} The core of his argument is that conventions or anything like a shared language — a shared vocabulary and a shared sense of how words ought to be used — is not at all necessary for communication to be successful. Communication, he argues, can and should be understood without reference to such a thing as a language.

In order to show how that might be possible, Davidson suggests shifting the perspective from the speaker to the hearer.\textsuperscript{98} The paradigmatic focus of his argument is not the capacity of the speaker to make herself understood, but the role of the interpreter who has to make sense of the world, the text and the noise around her. His focus rests on radical interpretations, namely moments in which an interpreter enters a completely


\textsuperscript{94} Ibid, 184-185.


\textsuperscript{96} Ibid, 1.


\textsuperscript{98} S Krämer, \textit{Sprache, Sprechakt, Kommunikation}, above n 19, 175-177.
new context such as a hypothetical field linguist in some forgotten place of the earth. What does that radical interpreter need to do in order to make sense of the linguistic practice of any person? She needs to observe social and linguistic behaviour and, gradually, build up a theory on what the speaker takes to be true when she says certain things.

Over time, we get so good at it that understanding becomes effortless and even automatic, according to Davidson. Most international legal arguments are immediately accessible to us whether we agree with them or not. But the fact of rather effortless understanding is prone to mislead, he notes. It makes us think all too readily that we are indeed speaking the same language. For Davidson:

> [w]hat is conventional about language, if anything is, is that people tend to speak much as their neighbours do. But in indicating this element of the conventional, or of the conditioning process that makes speakers rough linguistic facsimiles of their friends and parents, we explain no more than the convergence; we throw no light on the essential nature of the skills that are thus made to converge.

Since understanding frequently proceeds effortlessly, it is easy to think that there is a language that brings speakers and interpreters together. But that assumption is not necessary. It can be done away with, according to Davidson, and it also should be rejected. There are two main reasons. First, from the perspective of the interpreter, any theory that she will come up with about what a speaker takes to be true is bound to be indeterminate. There is the indeterminacy of what a sentence refers to. When a speaker says ‘this is a combatant’, does she do so because the person she points to holds a rifle or because that person wears insignia of an army? Interpreters can reasonably come up with different theories about what a single speaker takes to be true. There are no grounds for choosing only one out of the many possibilities. Whether the same

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sentence ‘this is a combatant’ is taken to be true depends on the specific speaker — one
speaker could take it to be true whenever she sees an individual with a rifle, another
when she sees army insignia. The sentence can be true under different conditions (if the
person has a rifle, if the person has army insignia). Once again: How could the
interpreter choose the language of international law that counts? It is for these two
reasons that Davidson suggests ‘[w]e must give up the idea of a clearly defined shared
structure which language-users acquire and then apply to cases.’ There is ‘no learnable
common core of consistent behaviour, no shared grammar or rules, no portable
interpreting machine set to grind out the meaning of an arbitrary utterance’. What
interpreters must develop is the ability to arrive at theories on what others take to be
ture. In Davidson’s view then, knowing a language amounts to the same thing as
‘knowing our way around in the world generally’. Doing so well is like setting up new
theories in any field and is ‘derived by wit, luck, and wisdom’.

With the curt statement ‘that there is no such thing as language’, Davidson
concludes an argument focused on the necessary conditions for people to understand
one another and to be understood. A shared language is not part of those conditions.
When it comes to the semantic struggle for international law, to be sure, actors not only
want to understand and to be understood. They also want to find recognition and
endorsements for their claims so that their language becomes the language of
international law. Davidson’s theory has the effect of alerting us that there might well
not be any such language, at least as long as it is thought of as a background scheme that
can be learned with a shared grammar and a stable vocabulary. The upshot of this
perspective is that it studies interpretation in its own right, not as an application of a
model. Thinking that way draws attention to the beliefs of the interpreter. It offers an

107 Ibid, 100 and 107. In a similar vein, I Johnstone has remarked that participants in the field of legal
practice ‘have learned its purpose and conventions not as a set of abstract rules but through the acquisition
of “know-how”, a mastering of discipline or technique’: The Power of Interpretive Communities’, above n 26,
with reference to G Postema, ‘Protestant Interpretation and Social Practices’ (1987) 6 Law and
Philosophy 283, 304.
109 But note that Davidson’s theory leaves room for a stock of autonomous meaning that is invariant
between different theories of truth. See D Davidson, ‘Reality without Reference’ in Inquiries into Truth and
Interpretation, above n 9900, 215, 225. Davidson is adamant about the ‘autonomy of meaning’, as he terms
it, precisely because the pitch of his argument pulls in the opposite direction. See D Davidson,
alienating view that might just help to better understand the familiar: the practice of interpretation.  

110 See B Brecht, ‘Short Description of a New Technique of Acting which Produces an Alienation Effect’ in J Willett, Brecht on Theatre: The Development of an Aesthetic (Eyre Methuen, London, 1977) 136, 143-4 (‘The alienation-effect consists in turning the object of which one is to be made aware, to which one’s attention is to be drawn, from something ordinary, familiar, immediately accessible, into something peculiar, striking and unexpected. What is obvious is in a certain sense made incomprehensible, but this is only in order that it may then be made all the easier to comprehend.’). I was referred to this passage in presenting Davidson’s theory by J Bung, ‘Theorie der Interpretation: Davidson’, in S Buckel, R Christensen and A Fischer-Lescano (eds), Neue Theorien des Rechts (Lucius und Lucius, Stuttgart, 2009) 271,271-2.